

## The State of South Carolina



## Office of the Attorney General

Opinion No. 87-20  
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February 25, 1987

The Honorable Robert O. Kay  
Member, House of Representatives  
436A Blatt Building  
Columbia, South Carolina 29211

Dear Representative Kay:

You have asked that this Office examine H.2012, concerning church cemeteries, and opine as to its constitutionality. You were particularly concerned about a possible violation of the Establishment Clause of the United States Constitution (separation of church and state).

If the bill should be adopted by the General Assembly, it must be remembered that in considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional. However, H.2012 in the form presented to this Office does not appear to have constitutional infirmities.

Statutes regulating cemeteries generally do not apply to church cemeteries, with two exceptions. See Section 39-55-295, Code of Laws of South Carolina (1976, as revised). Section 39-55-235 requires that signs as to presence or absence of perpetual care be posted at the entrance of cemeteries. Section 39-55-265 imposes criminal sanctions upon persons who fail to make required contributions to care and maintenance or other trust funds. This Office is not aware of any challenges

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having been made to the constitutionality of these statutes; as noted above, constitutionality is to be presumed.

H.2012 would amend the Code of Laws by adding Section 39-55-300, as follows:

Any church which receives money specifically designated for the maintenance of a cemetery on its property shall keep the money in a separate bank account and it may be used only for the maintenance of the cemetery. Any person or member of the church governing board who approves or permits the use of the fund for any other purpose is guilty of a misdemeanor and upon conviction must be fined not more than two hundred dollars or imprisoned for not more than thirty days.

Section 39-55-295 of the Code would be amended to include Section 39-55-300 as applicable to church cemeteries.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ... ." <sup>1/</sup> Article I, Section 2 of the Constitution of the State of South Carolina contains a virtually identical provision and protects the same rights as the First Amendment. Rock Hill v. Henry, 244 S.C. 74, 135 S.E.2d 718 (1963), rev'd on other grounds 376 U.S. 776 (1964). These provisions prohibit South Carolina from taking action respecting an establishment of religion. The clause is broadly written and prohibits laws respecting establishment of religion rather than simply prohibiting establishment of religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980). The First Amendment prohibits those acts of state which, though not actually establishing religion, tend toward such a result. Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972). The clause was intended to protect against sponsorship, financial support, and active involvement of the sovereign in religious activity. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

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<sup>1/</sup> The First Amendment has been held applicable to the states by operation of the Fourteenth Amendment to the United States Constitution. Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

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In evaluating whether an act of the state violates the United States Constitution, the three part test found in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973), must be applied. To pass muster under the establishment clause, the action must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. The challenged governmental action will be found to violate the Constitution if it runs afoul of any part of the three part test. American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (11th Cir. 1983).

In evaluating H.2012 in light of the three part test, we note that the apparent purpose of H.2012 is to insure that monies donated to a church for maintenance of its cemetery will in fact be used for that purpose, though there are no such explicit findings in the bill. If the church cemetery provides perpetual care, such a requirement is already applicable to the cemetery by Section 39-55-265; no such requirement appears to exist with respect to churches, the cemeteries of which do not provide perpetual care. Thus, H.2012 seems to impose a constructive trust status of sorts on these monies and provides a penalty for those who would violate the constructive trust. See, 76 Am.Jur.2d Trusts, § 221 et seq. Such appears to be a secular, or not religious in character, purpose. Knights of Columbus Council No. 3884 v. Mulcahy, 227 A.2d 413 (Conn. 1967); State v. Heaton, 10 Ohio App.2d 44, 225 N.E.2d 608 (1967).

Such a statute does not appear to either advance or inhibit religion in any way. The statute merely insures that funds donated for maintenance of church cemeteries will be used for that purpose. No state aid is being provided to a particular religion; no religious beliefs are being advanced; and no religious beliefs of any one faith are being enhanced to the detriment of any other faith. This statute treats alike all churches with cemeteries which do not provide perpetual care without regard to faith or belief.

The statute also appears to avoid an excessive governmental entanglement with religion. While a complete separation of church and state is not required by the Establishment Clause, Hunt v. McNair, 258 S.C. 97, 187 S.E.2d 645 (1972), an excessive entanglement of government and church is to be avoided. We note that no particular churches are being benefitted; further, no state aid is going to any church; and no relationship between

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a church and the government is being created. Unless prosecution under the proposed Section 39-55-300 should become necessary, the government's role in the situation aimed at by Section 39-55-300 would be concluded by the adoption of the statute. In insuring that the wishes of a benefactor to the maintenance fund of a church cemetery are carried out, a permissibly small, but by no means excessive, entanglement of church and state, primarily temporary in nature, does result. However, this entanglement appears to be no more intrusive than necessary to carry out the purpose of the statute as previously discussed.

South Carolina's constitutional provision has been discussed in such cases as Hunt v. McNair, *supra* (discussing the Educational Facilities Authority Act); Carolina Amusement Co. v. Martin, 236 S.C. 558, 115 S.E.2d 273 (1960) (discussing the "Blue Laws"); and Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972) (discussing the State Education Assistance Act). Each case discusses the three part test examined above to conclude that no violation of the state or federal Establishment Clauses would occur. While none of these cases dealt with requirements placed on church cemetery maintenance funds, the reasoning therein would be applicable to H.2012. Thus, H.2012 would most probably withstand scrutiny under these South Carolina decisions.

In conclusion, it is the opinion of this Office that H.2012 would most probably pass constitutional muster under the Establishment Clauses of the state and federal constitutions. Of course, the final determination would be up to a court of competent jurisdiction, but until such a determination should be made, H.2012 would be presumed to be constitutional.

With kindest regards, I am

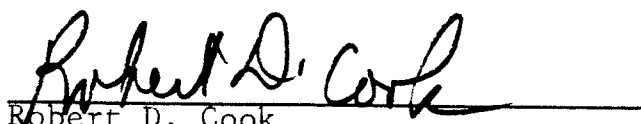
Sincerely,

*Patricia D. Petway*

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Assistant Attorney General

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REVIEWED AND APPROVED BY:

  
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